



North Dakota Attorney General's LAW REPORT

Wayne Stenehjem, Attorney General
State Capitol - 600 E Boulevard Ave. Dept 125
Bismarck, ND 58505-0040
(701) 328-2210

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VEHICLE SEARCH - BELTON SEARCH - RECENT VEHICLE OCCUPANT

In *Thornton v. United States*, ___ U.S. ___ (2004), the court held that New York v. Belton, 453 U.S. 454 (1991), permits police to search a car's passenger compartment incident to the lawful arrest of both "occupants" and "recent occupants."

Thornton was observed by a law enforcement officer operating a car with license tags issued to another vehicle. Before the officer had an opportunity to pull Thornton over, Thornton drove into a parking lot, parked, and got out of the vehicle. The officer saw Thornton leave his vehicle as he pulled in behind him.

The officer told Thornton that the license tags did not match the vehicle he was driving. Thornton appeared nervous, began rambling, licking his lips, and he was sweating. Concerned for his safety, the officer asked Thornton if he had any narcotics or weapons on him or in his vehicle and Thornton said no.

Thornton agreed to allow the officer to pat him down. During the pat down, the officer felt a bulge in Thornton's left front pocket and again asked him if he had any illegal narcotics on him. Thornton stated that he did, reached into his pocket, and pulled out two individuals bags containing marijuana and crack cocaine. Thornton was arrested. The officer then placed Thornton in the back seat of the patrol car, searched Thornton's vehicle, and found a handgun under the driver's seat.

Thornton claimed that Belton was limited to situations where the officer initiated contact with an arrestee while he was still an occupant of the car. This argument was rejected by the court of appeals.

In affirming Thornton's conviction, the court recognized that Belton governed the search even

when an officer does not make contact until the person arrested has left the vehicle. The court found no basis to conclude that the span of the area generally within the arrestee's immediate control is determined whether the arrestee exited the vehicle at the officer's direction or whether the officer initiated contact with him while he was in the car. The arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and evidence destruction as one who is inside.

The court in Belton held that when a policeman has made a lawful custodial arrest of the occupant of the automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. The court noted that the defendant in Belton was not inside the car at the time of his arrest and search, but was standing on the highway. While an arrestee's status as a "recent occupant" may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it does not turn on whether the arrestee was inside or outside the car at the moment the officer first initiated contact with him.

Although it was unlikely in this case that Thornton could have reached under the driver's seat for the gun once he was outside of his automobile, the firearm and the passenger compartment in general were no more inaccessible than was the contraband in the passenger compartment in Belton.

Once an officer determines there is probable cause to make an arrest, it is reasonable to allow the officer to insure safety and preserve evidence by searching the entire passenger compartment. When the arrestee is the sort of "recent occupant" of a vehicle as Thornton was in this case, the officer may search that vehicle incident to an arrest.

MIRANDA - CUSTODIAL INTERROGATION

In *Yarborough v. Alvarado*, ____ U.S. ____ (2004), the court reversed a circuit court of appeals habeas corpus order that overturned Alvarado's state conviction upon the grounds that the state court applied the wrong factors in determining whether Alvarado was in custody at the time of his questioning.

The Defendant, who was 17 years of age, helped another individual steal a truck, leading to the death of the truck's owner. Although initially denying involvement in the crime, Alvarado slowly began to change his story and finally admitted that he had helped steal the truck and hide the gun after the murder. The interview lasted two hours and the defendant was not given a Miranda warning. The defendant's parents remained in the lobby during the interview and only an officer and the defendant were present in a small interview room.

During the interview, the officer twice asked the defendant if he needed a break and, when the interview was over, returned him to his parents, who drove him home.

The defendant claimed that he was in custody during the interview and moved to suppress his interview statements on Miranda grounds. Although the state courts upheld the use of the statements, the Ninth Circuit Court of Appeals held that the state court erred in failing to account for the defendant's youth and inexperience when evaluating whether a reasonable person in this position would have felt free to leave the interview.

In reversing the court of appeals' decision, the court concluded that the state court considered the proper factors and reached a reasonable conclusion that the defendant was not in custody for Miranda purposes during his police interview.

The court noted that the initial determination of custody depends on the objective circumstances of the interrogation, not the subjective views harbored by either the interrogating officers or the person being questioned. Courts must examine all of the circumstances surrounding the interrogation and determine how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.

Two inquiries are essential to this determination: first, what were the circumstances surrounding the interrogation; and second, given those

circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave?

The court reviewed all of the objective facts and concluded that they were consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave. The police did not transport the defendant to the station or require him to appear at a particular time. They did not threaten him or suggest he would be placed under arrest. The defendant's parents remained in the lobby during the interview, suggesting that the interview would be brief. The defendant and his parents were told that the interview was not going to be long. During the interview, the officer focused on the other individuals' crimes rather than the defendant's. Instead of pressuring the defendant with the threat of arrest and prosecution, the officer appealed to his interests in telling the truth and being helpful to a police officer. In addition, the officer twice asked the defendant if he wanted to take a break and at the end of the interview, the defendant went home.

Other facts point in the opposite direction. The officer interviewed the defendant at the police station and the interview lasted two hours. The officer did not tell the defendant he was free to leave and he was brought to the police station by his legal guardians rather than arriving on his own accord, making the extent of his control over his presence unclear. These facts weigh in favor of the view that the defendant was in custody.

These differing indications led the court to hold that the state court's application of the established custody standard was reasonable. The custody test is general and the state court's application of the law fits within the matrix of the court's prior decisions. In a habeas corpus proceeding under the Antiterrorism and Effective Death Penalty Act of 1996, a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the state court decision applied the law incorrectly. Relief is available under that law only if the state's court decision is objectively unreasonable. Under that standard, the court could not grant the relief.

The court also noted that its prior opinions applying the Miranda custody test do not mention the suspect's age, much less mandated its consideration. The court recognized an important conceptual difference between the Miranda

custody test and the line of cases from other contexts considering age and experience. The Miranda custody inquiry is an objective test. The objective test furthers the clarity of the Miranda rule, insuring the police do not need to make guesses as to the circumstances at issue before deciding how they may interrogate the suspect.

Where the court does consider a suspect's age and experience, the actual mindset of a particular suspect may be considered when determining the voluntariness of a statement. The custody inquiry states an objective rule designed to give clear guidance to the police while consideration of a suspect's individual characteristics, including his age, could be viewed as creating a subjective inquiry.

STOP AND IDENTIFY STATUTES

In *Hiibel v. Sixth Judicial District Court of Nevada, Humbolt County*, ____ U.S. ____ (2004), the court upheld Hiibel's conviction for refusing to identify himself during a Terry v. Ohio stop.

A sheriff's department received a telephone call reporting an assault involving a man and a woman in a red and silver truck. When the deputy arrived to investigate, he found the truck parked on the side of the road with a man standing by the truck and a young woman sitting inside it. The officer observed skid marks in the gravel behind the vehicle, leading him to believe it had come to a sudden stop. The man appeared to be intoxicated.

The officer asked him if he had any identification. The man, later identified to be Hiibel, refused to identify himself. After the officer made eleven requests for identification and Hiibel refused each time, Hiibel was placed under arrest for violating a Nevada statute for willfully resisting, delaying, or obstructing a public officer in discharging or attempting to discharge a legal duty of his office.

Nevada had a "stop and identify" statute that defined the rights and duties of a police officer in the context of an investigative stop, including a requirement that a person so detained would identify themselves. (North Dakota has a similar statute, N.D.C.C. § 29-29-21, but does not require an answer to a request for identification.)

On appeal from his conviction, Hiibel claimed that application of the "stop and identify" statute to his case violated his rights under the Fourth and Fifth Amendments.

In most cases, police officers will not know a suspect's interrogation history. Even if they do, the relationship between a suspect's past experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative. Suspects with prior law enforcement experience may understand police procedures and reasonably feel free to leave unless told otherwise. The court does not ask police officers to consider these contingent psychological factors in deciding when suspects should be advised of their Miranda rights. The inquiry turns too much on the suspect's subjective state of mind and not enough on the objective circumstances of the interrogation.

In affirming Hiibel's conviction, the court distinguished prior decisions invalidating convictions for violating stop and identify statutes. In Brown v. Texas, 443 US 47 (1979), a conviction for violating a Texas stop and identify statute was invalidated on Fourth Amendment grounds. In Brown the initial stop was not based on specific, objective facts establishing reasonable suspicion to believe the suspect was involved in criminal activity. In the second case, Kolender v. Lawson, 461 US 352 (1983), a California stop and identify statute was found to be void for vagueness because it provided no standard for determining what a suspect must do to comply with the statute. The California law required a suspect to give an officer "credible and reliable" identification when asked to identify himself.

Unlike Brown, there was no question in this case that the initial stop was based on reasonable suspicion satisfying the Fourth Amendment requirements noted in Brown. In addition, Hiibel had not alleged that the statute was unconstitutionally vague, as in Kolender. The Nevada statute is narrow and more precise. The statute does not require a suspect to give the officer a driver's license or any other document, provided the suspect either states his name or communicates it to the officer by other means, a choice that the suspect may make. In such a case, the statute is satisfied and no violation occurs.

The court rejected Hiibel's argument that the officer's conduct violated his Fourth Amendment rights. Asking questions is an essential part of

police investigations. In the ordinary course, a police officer is free to ask a person for identification without implicating the Fourth Amendment. Beginning with Terry v. Ohio, 392 US 1 (1968), the court has recognized that a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further.

Questions concerning a suspect's identity are a routine and accepted part of many Terry stops. Obtaining a suspect's name in the course of a Terry stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense or has a record of violence or mental disorder. In addition, knowing the identity of a suspect may help clear a suspect and allow the police to concentrate their efforts elsewhere. Identity may prove particularly important in cases such as this where the police are investigating what appears to be a domestic assault. Officers called to investigate domestic disputes need to know with whom they are dealing, in order to assess the situation, the threat to their own safety, and possible danger to a potential victim.

Although it is well established that an officer may ask a suspect to identify himself in the course of a Terry stop, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer. The Fourth Amendment does not impose obligations on the citizen but instead provides rights against the government. As a result, the Fourth Amendment itself cannot require a suspect to answer questions. This case concerns a different issue. The source of the legal obligation arises from Nevada state law and not from the Fourth Amendment. The statutory obligation does not go beyond answering an officer's request to disclose a name.

The principles of Terry permit a state to require a suspect to disclose his name in the course of a Terry stop. The reasonableness of a seizure under the Fourth Amendment is determined by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests. The Nevada statute satisfies that standard. The request for identity has an immediate relation to the purpose, rationale, and practical demands of a Terry stop. The threat of criminal sanction helps ensure the requests for identity do not become a legal nullity. The Nevada statute does not alter the nature of the stop itself since it does not change its duration or its location. A state law requiring a suspect to

disclose his name in the course of valid Terry stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures.

Terry requires that a stop be justified at its inception and reasonably related in scope to the circumstances which justify the initial stop. An officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop. In this case, the request for identification was reasonably related in scope to the circumstances which justified the stop. The officer's request was a common sense inquiry and not an effort to obtain an arrest for failure to identify after a Terry stop yielded insufficient evidence. The stop, the request, and the state's requirement of a response did not contravene the guarantees of the Fourth Amendment.

The court also rejected Hiibel's claim that the conviction violated his Fifth Amendment prohibition on compelled self-incrimination. The Fifth Amendment prohibits only compelled testimony that is incriminating. The Fifth Amendment privilege against compulsory self-incrimination protects against any disclosures the person reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. Suspects who have been granted immunity from prosecution may be compelled to answer since once the threat of prosecution is removed, there can be no reasonable belief that the evidence will be used against them. In this case, Hiibel's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him or that it would furnish a link in the chain of evidence needed to prosecute him. Hiibel refused to identify himself only because he thought his name was none of the officer's business. While the court recognized Hiibel's strong belief that he should not have to disclose his identity, the Fifth Amendment does not override the Nevada Legislature's judgment to the contrary, absent a reasonable belief that the disclosure would tend to incriminate him.

The narrow scope of the disclosure requirement is also important. One's identity is, by definition, unique; yet it is, in another sense, a universal characteristic. Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances. Even witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called to take the stand. A case may arise where there is a substantial

allegation that to furnish an identity at the time of a stop would have given the police a link in the change of evidence needed to convict the individual of a separate offense. In that case, the court can then consider whether the privilege

applies and, if the Fifth Amendment has been violated, what remedy must follow. The court found it unnecessary to resolve those issues in this case.

COMMITMENT OF SEXUAL DANGEROUS INDIVIDUAL

In *Interest of DVA*, 2004 ND 57, 676 N.W.2d 776, the court affirmed an order committing DVA for treatment as a sexually dangerous individual after proceedings initiated under N.D.C.C. ch. 25-03.3. Two psychologists at the State Hospital evaluated DVA. Both psychologists testified he was a sexually dangerous individual and likely to reoffend if not committed. They were the only witnesses at the commitment hearing.

One psychologist reviewed DVA's legal files, clinical files, and treatment records, and conducted four interviews with him. The second psychologist relied on penitentiary records, treatment records, psychological reports, state hospital records, conversations with a psychologist at the North Dakota State Penitentiary, and four interviews with DVA.

DVA claimed the psychologist's opinions were based upon inadmissible hearsay and should not have been used to deprive him of his liberty.

N.D.C.C. § 25-03.3-13 provides that any testimony and reports of an expert who conducted an examination are admissible, including risk assessment evaluations. Both psychologists

testified that the information relied upon in their evaluations was generally relied upon by experts in psychology to determine whether the person is a sexually dangerous individual. DVA did not produce any evidence refuting this testimony. In addition, the weakness or nonexistence of a basis for an expert's opinion goes to that expert's credibility and not necessarily to the admissibility of the opinion evidence.

The court also rejected DVA's claim that the state failed to meet its burden of proof because no evidence was offered to show that he did not suffer from mental retardation. The court concluded that DVA misapplied the burden placed on the state. Chapter 25-03.3 does not require the state to establish that DVA is not mentally retarded and it does not prohibit a person with mental retardation from being committed as a sexually dangerous individual. The state does not have a burden to establish DVA does not suffer from mental retardation but was only required to comply with certain procedures if it knew or believed DVA was an individual with mental retardation. No evidence was presented that DVA was an individual with mental retardation.

DUI - CHEMICAL TESTING

In *Johnson v. North Dakota Department of Transportation*, 2004 ND 59, 676 N.W.2d 807, the court reversed a lower court decision reinstating an administrative hearing officer's decision to suspend Johnson's driving privileges.

An officer stopped Johnson for a traffic violation. After failing field sobriety tests and the S-D2 test, Johnson was arrested for DUI.

Before administering the S-D2 test, the officer advised Johnson of the North Dakota implied consent law. The officer checked Johnson's mouth and established a five-minute waiting period. After the S-D2 test, Johnson was arrested, handcuffed, and placed in the back of the police car. The arrest occurred at 1:32 a.m.

and it took one or two minutes to drive to the corrections center.

Once arriving at the corrections center, Johnson was again notified of the implied consent law and the officer checked the inside of Johnson's mouth. The officer also observed Johnson for 20 minutes before administering the intoxilyzer test. The first breath sample was taken at 1:51 a.m.

After a request for an administrative hearing, the administrative hearing officer, over the objection of Johnson, found that the 20-minute waiting period had been observed by the time the officer administered the intoxilyzer test and Johnson's driving privileges were suspended for 91 days.

The district court reversed the hearing officer's decision concluding that there was not a 20-minute wait prior to the administration of the intoxilyzer test. The district court explained that the waiting period for the intoxilyzer test did not begin until after the S-D2 test had been administered. The court explained that because each test had its own approved method with different waiting periods and different purposes, the waiting period for the S-D2 test could not be tacked on to waiting period for the intoxilyzer test.

In reversing the district court order, the court noted that the approved method to conduct a breath test with an intoxilyzer required the operator determine the subject had nothing to eat, drink, or smoke within 20 minutes prior to the collection of the breath sample.

The Department of Transportation argued that the 20 minutes did not have to be calculated from the time of arrest and it can use the time from the S-D2 testing. The court concluded the district court misapplied the law when it found the waiting period for the S-D2 test could not be used for the intoxilyzer test.

Johnson claimed that he was arrested at 1:32 a.m., they arrived at the corrections center at 1:35 a.m., and the first breath sample was obtained at 1:51 a.m. He argued that because there was a maximum of 60 minutes between the time the officer determined whether Johnson had anything to eat, drink, or smoke, and the time the officer collected the breath sample, there was no foundation for the intoxilyzer test.

The officer testified that 5 minutes before administration of the S-D2 test he checked Johnson's mouth. After that test, Johnson was placed under arrest, his hands were cuffed behind his back, and he was placed in the back of the patrol car. Johnson was arrested at 1:32 a.m. and, therefore, the officer checked Johnson's mouth at approximately 1:27 a.m. The intoxilyzer test was conducted at 1:51 a.m. During those 24 minutes, Johnson's hands were cuffed behind his back and he was transported in the back of the patrol car to the corrections center. After they arrived at the corrections center at 1:35 a.m., the officer observed Johnson until the intoxilyzer test was administered.

Although the officer testified he did not ascertain until after arriving at the corrections center that Johnson had nothing to eat, drink, or smoke, the testimony is clear that Johnson's mouth was checked prior to his taking the S-D2 test. It was also clear that he had nothing to eat, drink, or smoke between the time of the S-D2 test and the administration of the intoxilyzer test.

The court also rejected Johnson's argument that there was no testimony provided to establish he was continuously observed by the officer from the point of the administration of the S-D2 test until the point of the intoxilyzer test. Observation is not the exclusive method of ascertaining whether the 20-minute requirement has been met. A fact finder can draw reasonable inferences from the evidence. It is not unreasonable for a fact finder to infer that a person who had been handcuffed behind his back and had remained in police custody would have had nothing to eat, drink, or smoke during that time.

SEARCH AND SEIZURE - CONSENT SEARCH

In *State v. Guscette*, 2004 ND 71, 678 N.W.2d 126, the court affirmed the defendant's conviction for possession of drug paraphernalia.

An officer stopped a vehicle driven by the defendant for a broken taillight. After verifying the defendant's driver's license, the officer engaged the defendant in further conversation about automobile insurance and the whereabouts of a Corey Mock. The officer asked the defendant to step out of her vehicle. The officer again talked to the defendant about Mock and a previous encounter she had with law enforcement officers. He ultimately informed her that he was giving her a warning and that she was free to leave.

Before the defendant got back into her vehicle, the officer asked her if she had any weapons, needles, knives, or anything else illegal in the vehicle. After stating that she did not, the officer asked her for permission to search the vehicle, which she granted.

The officer found a black purse in the front seat containing drug paraphernalia. The defendant commented to another officer that she had consented to a search of the vehicle but not the purse.

The defendant claimed her continued detention after the time necessary to complete the initial traffic stop violated her fourth amendment right to

be free from an unreasonable seizure. The defendant conceded the initial stop of her vehicle for a traffic violation was proper and once a traffic violation has occurred and a traffic stop made, an officer may temporarily detain a traffic violator at the scene of the violation. The defendant claimed, however, that the officer's conduct after the time necessary to complete the traffic stop constituted an illegal seizure under the fourth amendment. She argued that the facts and circumstances did not give the officer a reasonable suspicion she was engaged in criminal activity and her consent to search the vehicle following the illegal seizure was tainted.

The court's inquiry first focused on whether the officer seized the defendant when he asked to search her vehicle. Not every law enforcement contact with a citizen is a seizure, and law enforcement officers do not violate the fourth amendment merely by approaching individuals on the street or in other places. A seizure does not occur simply because a law enforcement officer questions a person. As long as reasonable persons would feel free to disregard the officer and go about their business, the encounter is consensual and a reasonable suspicion of criminal activity is not required. If reasonable persons would feel free to terminate the encounter, they have not been seized under the fourth amendment. To constitute a seizure, an officer must in some way restrain an individual's liberty by physical force or show of authority. In *State v. Fields*, 2003 ND 81, 662 N.W.2d 242, the court found that a person has been seized within the meaning of the fourth amendment if, in view of all of the surrounding circumstances, a reasonable person would have believed he or she was not free to leave the scene.

The officer gave the defendant a verbal warning, handed her a driver's license, and told her she was free to leave.

Before the defendant returned to her vehicle, the officer asked her if she had any weapons or other illegal items in the vehicle and then asked for a consent to search her vehicle which she granted. The court distinguished *Fields* in that the defendant was not detained by the officer while a drug detection dog was called to the scene.

Nothing in the record indicated the exchange between the officer and the defendant required anything more than a minimal period of time, and the defendant further testified she was not nervous during her encounter with the officer. There was no threat or show of force by the officer when he asked for consent to search the vehicle. There was sufficient competent evidence supporting the trial court's finding that the defendant was free to leave and had not been seized when she consented to the search of the vehicle.

The court also concluded that the defendant voluntarily consented to the search of her vehicle under the totality-of-the-circumstances. Nothing in the record supported a conclusion that the defendant's consent was the product of coercion. The defendant's general consent to search a car includes a consent to search containers within the vehicle which may contain the items sought. The trial court found the officer asked the defendant for consent to search the vehicle after asking her if there were any weapons, knives, or anything else illegal in the vehicle. The defendant's purse was in the vehicle, and weapons or knives are items that could be found in a purse. The defendant put no limitations on her initial consent to search the vehicle and, by the time the defendant may have withdrawn her consent, the contraband had already been discovered.

REVOCATION OF PROBATION - RIGHT TO COUNSEL - DOUBLE JEOPARDY - APPEAL NOTICE

In *State v. Causer*, 2004 ND 75, 678 N.W.2d 552, the court affirmed the district court's order revoking the defendant's probation and resentencing him to a term of imprisonment exceeding the original sentence.

After a plea of guilty to gross sexual imposition, the defendant was sentenced to ten years imprisonment with four years suspended. After the defendant's release from imprisonment, the

trial court revoked his probation on four separate occasions. Based on the first three revocations, conditions of the defendant's probation were expanded, including an extension of his probation by one year.

The defendant's probation officer visited his home, but the defendant did not respond to knocks on his door. The probation officer and law enforcement officers told him they entered the

home and continued to call out for him while searching inside the home. The Defendant was discovered hiding in the attic.

During the home search, the probation officer and the law enforcement officers found full beer bottles in the attic, beer bottle caps in the home, and empty beer cans in the garbage. The probation officer also seized a bow, arrows, a pocket knife, and two box cutters, items she identified as dangerous weapons. Also discovered were pornographic tapes, pornographic magazines, sex toys, female clothing, and the defendant's own art work depicting sexual acts.

After the search, the defendant was discharged from a sex offender treatment program because of his lapse in behavior based on the pornographic items discovered in a search of the home. A few weeks later, the probation officer subjected the defendant to a urine analysis. The sample tested positive for amphetamines.

The probation officer moved for probation revocation alleging six violations of the defendant's probation. The defendant's probation was revoked and he was resentenced to 13 years and 52 days imprisonment with credit for six years and 52 days for time served. In addition, the defendant was ordered to complete sex offender treatment and to be placed on three years of supervised probation upon his release from prison.

After rejecting the defendant's claims that he did not have proper notice of the allegations in the probation revocation petition and that he received ineffective assistance of counsel, the court also rejected the defendant's claims that the trial court failed to inform him of his right to appeal the probation revocation and that he was denied his right to counsel on appeal.

There is no federal constitutional right to appeal a state criminal conviction. Because there is no constitutional right to appeal, there is no constitutional right to be notified of a right to appeal. A defendant has a statutory right to appeal. N.D.C.C. § 29-28-06 provides statutory authority for this right and specifies the various orders and judgments from which a defendant may appeal. The defendant's statutory right of appeal includes the right to appeal from an order revoking probation. There is no statutory procedural requirement that the defendant be notified of his right to appeal a revocation of probation. Under North Dakota Rule of Criminal Procedure 32(f), the trial court is not obligated to

advise a defendant of his right to appeal from the revocation. The defendant was not entitled to notice of his right to appeal and the trial court did not err by failing to provide such notice. Further, the defendant's appeal was timely filed and he was not harmed by the trial court's alleged error.

The court also held the defendant's constitutional right to counsel did not attach in an appellate proceeding because there is no federal or state constitutional right to appeal. The defendant's constitutional right to counsel was not violated when the trial court neither informed him of his right to counsel nor appointed the defendant counsel on appeal.

Under North Dakota law, a defendant has a non-constitutional right to counsel at all stages of an appeal. North Dakota law provides such counsel is appointed upon request. The defendant failed to request court appointed counsel on appeal. Rule 32(f) does not provide a defendant with the right to counsel and appeal nor does it state that the trial court has a duty to inform the defendant of such a right. A trial court cannot be required to notify a defendant of the right to counsel on appeal if the trial court is not obligated to notify the defendant of the right to appeal.

A trial court has broad discretion to impose conditions of probation. The trial court retains the discretion to impose conditions it deems appropriate considering the facts and circumstances of a particular case. The only statutory limitation placed upon the trial court's authority to impose probation is that the conditions be reasonably necessary to insure the defendant will lead a law-abiding life, or assist the defendant to do so.

On appeal from a probation revocation, the court will apply a two-step analysis. First, the court will review the trial court's factual finding of a probation violation under the clearly erroneous standard. The court will not substitute its judgment for the trial court when there is testimony to support the trial court's findings. Second, the court applies the abuse of discretion standard to review the trial court's determination that revocation of probation was warranted. The court reviewed each of the grounds that provided a basis for the order revoking probation and concluded the trial court findings were supported by the evidence and the revocation determination was not an abuse of the trial court's discretion.

The court also rejected the defendant's claim that his right against double jeopardy was violated by the trial court's imposition of additional probation as a part of the resentencing. Resentencing a defendant after probation revocation is not a double jeopardy violation. When the defendant was convicted of gross sexual imposition, the trial court had the authority to sentence the defendant to a maximum of 20 years imprisonment. At that time, the trial court also had authority to impose

sentencing alternatives such as probation. Those options remain available to the trial court at the time of resentencing. In a felony case, a violation of probation may subject the defendant to an additional period of probation not to exceed five years. In addition, when he was originally sentenced, the trial court had authority to resentence the defendant to any sentence that was available to the court at the time of initial sentencing when the probation was revoked.

WAIVER OF CLAIMED ERRORS ON APPEAL - STATUTE OF LIMITATIONS CONSTITUTIONALITY

In *State v. Buchholz*, 2004 ND 77, 678 N.W.2d 144, the court affirmed the defendant's conviction of gross sexual imposition.

The defendant was convicted of engaging in sexual contacts between June 14, 1985, and December 31, 1998, with his stepdaughter, who was less than 15 years old when the contacts occurred. The stepdaughter was born in 1979. She testified at trial that the defendant engaged in two separate instances of sexual contact with her when she was 11 or 12 years old and frequently entered her bedroom during the night and fondled her breasts. Although she tried to forget the incidents, she did report them to law enforcement officials more than 10 years later in October of 2002, when her twelve-year-old half sister returned home from scheduled visitation with the defendant with a hickey.

In a pretrial motion, the defendant sought to suppress all testimony and references regarding the incident wherein he was alleged to have given his daughter a hickey. The state argued the evidence about the hickey was admissible under North Dakota Rule of Evidence 404(b) to establish the complainant's motive for reporting the allegations of gross sexual imposition in 2002. The trial court issued a pretrial order denying the defendant's motion to suppress, recognizing the evidence may be admissible for purposes other than proving the character of a person and any ruling by the court would be premature.

The trial court's decision contemplated reconsideration of the issue when it was presented in the context of the trial. However, the defendant did not object to any reference to the hickey at trial and did not provide the trial court with an opportunity to rule on that issue in the context of the trial. A party must object when the alleged error occurs at trial so the court can take appropriate action, if possible, to remedy any

prejudice that may have resulted. The defendant's failure to object at trial operates as a waiver of any claimed error about the hickey. The court also rejected the defendant's claim regarding the trial court's refusal to instruct the jury on its consideration of evidence about other alleged wrongful acts. The defendant did not request an instruction on this issue in the requested jury instructions submitted before trial. Although the question was raised during trial, the defendant did not offer a specific instruction. The trial court granted the defendant until the conclusion of testimony to provide the court with an instruction on that issue but he did not do so. The defendant's failure to submit a proposed instruction precluded him from claiming error for the failure to instruct on the issue. By failing to properly raise issues regarding alleged wrongful acts at trial, the defendant failed to preserve the issues for review unless they constitute obvious error. The court could not conclude that obvious error occurred.

The defendant claimed the trial court erred in applying the statute of limitations of N.D.C.C. § 29-04-03.1 which, as amended in 1993, provided that the offense of gross sexual imposition must be commenced in the proper court within seven years after the commission of the offense or, if the victim failed to report the offense within this limitation period, within three years after the offense is reported to law enforcement authorities. The statute of limitations applied to victims who were under the age of 18 years at the time of the offense.

The court concluded the 1993 statute of limitations applied to offenses for which the statute of limitations had not expired under the prior law. The defendant was charged with gross sexual imposition for acts allegedly occurring between June 14, 1985, and December 31, 1991. The complainant testified the sexual contacts occurred

when she was 11 or 12 which was 1990 or 1991. Applying State v. Davenport, 536 N.W.2d 686 (N.D. 1995), the court concluded the statute of limitations against the defendant had not expired when the Legislature amended N.D.C.C. § 29-04-03.1 in 1993.

The court also held that applying the 1993 statute of limitations version to conduct occurring in 1990 or 1991, did not violate the ex post facto clause and did not deny the defendant a right to a speedy and fair trial. In addition, the defendant failed to show actual prejudice or intentional delay by the state to gain some tactical advantage over him or to harass him in support of any suggestion that preaccusatory delays in the prosecution violated his right to due process.

The defendant also claimed the state violated a sequestration order. Before trial, the court issued a general order requiring sequestration of witnesses. After the first day of trial, the prosecutor simultaneously met in office with the

complainant and a high school friend of the complainant. At that time, neither the complainant nor her friend had testified.

The plain language of North Dakota Rule of Evidence 615 requires the court to exclude witnesses when requested by a party so they cannot hear the testimony of other witnesses. Sequestration of witnesses serves two related policies: to prevent witnesses from tailoring testimony in light of the testimony of other witnesses, and to permit discovery of false testimony and other credibility problems.

The trial court's sequestration order did not specifically address witnesses out-of-court communications during trial. In the absence of specific language in the sequestration order addressing witness's out-of-court communications during trial, the court followed federal decisions construing Federal Rule of Evidence 615, holding the plain language of the rule does not apply to witness's out-of-court communications during trial.

STOP AND FRISK - INEVITABLE DISCOVERY

In *State v. Parizek*, 2004 ND 78, 678 N.W.2d 154, the court affirmed the defendant's conviction of various controlled substance and paraphernalia violations.

Shortly after midnight, two officers were dispatched to a residence to respond to a call that person was knocking on the residence door. The officers observed several individuals including the defendant and another person at the door, and a man sitting in a van. The resident wanted the persons off his premises.

One of the officers began talking with the defendant near the van and noticed that he was acting oddly. The officer testified the defendant was very jumpy and bouncing all over the place. He reached toward his pockets, and the officers asked him to keep his hands out of his pocket. He denied he had any weapons. The officer did an external pat down of the defendant's front and rear pockets of his pants and felt what appeared to be cylinder type object in his right front pocket. The defendant stated, in response to her question, that it was a lighter, but it did not feel to be a lighter to the officer. She pulled the cylinder out of the pocket and attempted to open it. The defendant snatched it out of the officer's hands and began to step back from the officer. The defendant continued to step back from the officer despite a request by the officer to retain

possession of the cylinder. After a scuffle with the defendant, the cylinder was thrown into the yard next to where a vehicle was parked.

The officer found the cylinder, and observed inside of it a green leafy substance that appeared to be marijuana and a small tin foil containing what turned out to be methamphetamine. A consensual search of the van revealed articles in the van used for manufacturing methamphetamine.

The defendant first argued the officers had no right to stop or seize him. To stop a person for investigative purposes, an officer must have an articulable and reasonable suspicion that a law has been or is being violated. In determining whether an investigatory stop is valid, an objective standard is applied and the court will look toward the totality-of-the-circumstances. The question is whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity. The itemized reasons for a stop listed in N.D.C.C. § 29-29-21 are not exclusive of the instances where a stop on reasonable suspicion grounds is appropriate.

Police officers may freeze a situation and conduct a limited investigative stop of persons present at

the scene of a recently committed crime without violating the fourth amendment. Even in circumstances where no one person can be singled out as the probable offender, police officers must be allowed to take some action intermediate to that of arrest and nonseizure activity, where corroboration of a tip through observation of illegality is not practical.

Under the totality-of-the-circumstances, the court concluded the officers had a reasonable and articulable suspicion that the defendant was engaged in unlawful activity and were justified in temporarily detaining him to freeze the situation for further investigation. The officers were not required to have probable cause to arrest for violation of a law but only reasonable and articulable suspicion that a law had been violated. Although the dispatch may have been somewhat ambiguous, a call to the police is an unusual response to a knock on the door. The lateness of the hour is another factor that may raise the level of suspicion to justify an investigative stop.

The court rejected the defendant's claim that the officer had no justification to conduct a pat down search of him. A law enforcement officer may conduct a frisk or a pat down search of a person only when the officer possesses an articulable suspicion the individual is armed and dangerous. The officer need not be absolutely certain that the individual is armed, since the issue is whether a reasonably prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger. The defendant was very jumpy, bouncing all over the place and acting oddly. He reached toward his pockets. The officer testified that she asked him to keep his hands out of his pockets. Reaching into one's pockets after being told not to do so gives an officer an articulable suspicion that the subject might be armed and dangerous.

A valid pat down search consists solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. A pat down is not simply a routine preliminary to a more extensive search. When an outside clothing pat down search reveals the presence of an object of the size and density reasonable suggesting the object might be a weapon, the searching officer is entitled to continue the search to the inner garments where the object is located to determine whether the object is in fact a weapon.

Because weapon verification is essential if safety is to be preserved and a potentially volatile

situation neutralized, certainty that an object is a weapon is not required before an officer may continue a pat down search to the inner clothing site where the object is located. A more intrusive pat down search may be constitutionally permissible if the officer is responding proportionately to the actions of a subject. If an officer continues to explore a detainee's pocket after concluding it contains no weapon, the valid scope of a Terry v. Ohio search has been exceeded and any contraband discovered in the pocket must be suppressed.

In this case, although the officer did not believe the cylinder was a weapon, she was not certain until she felt it in the pocket. Given the defendant's erratic behavior, the officer's actions were a proportionate response to her safety concerns and the defendant's actions. The officer acted reasonably to protect herself by taking possession of the object. The officer was justified in conducting the pocket search.

The defendant also claimed the opening and search of cylinder after it had been removed from his pocket was illegal. Once the object was removed from the pocket, the officer agreed the safety issue was dismissed and curiosity replaced safety. Generally, where an object recovered from a suspect during a pat down is a closed container, the officer may not open the container to examine its contents unless the officer can point to specific and articulable facts supporting a reasonable suspicion that the closed container poses a danger to the officer or others nearby.

However, even if opening and searching the cylinder was illegal, it did not follow that the defendant should have prevailed on his motion to suppress. Evidence obtained by unlawful police conduct is admissible if the prosecution proves by a preponderance of the evidence that the evidence would inevitably have been discovered by lawful means.

The officers observed incriminating items in a van. The defendant consented to a search of that van. It was not the knowledge the officers gained by opening the cylinder that led to the discovery of the incriminating items in the van, but an officer's subsequent plain view observation of the incriminating items. The discovery of the items in the van gave the officers probable cause to arrest the defendant. If the fruits of a challenged search are not necessary to support probable cause to arrest, it is not important that the challenged search shortly preceded the formal arrest. The controlled substances discovered in the cylinder

were not necessary to establish probable cause to arrest the defendant and it would inevitably have

been discovered in the valid search incident to the defendant's arrest.

DISMISSAL - ALLEGED PROSECUTORIAL MISCONDUCT

In *State v. Tweeten*, 2004 ND 90, 679 N.W.2d 287, the court reversed an order of dismissal and remanded for further proceedings.

On December 10, 2002, the defendant was served with a criminal information alleging that he committed felony child abuse and neglect of his minor child. The trial was originally set for May 28, 2003, but on May 27, the district court contacted the state's attorney's office and notified it that scheduling conflicts required the trial date to be moved to May 29, 2003. The state informed the district court it could not comply with the May 29, 2003, trial date. Subpoenas issued to the state's witnesses specified the date and time set for trial as May 28, 2003. Some of the witnesses were members of the defendant's family and were uncooperative. Upon notification that the trial date would have to be moved, the state moved the district court to reconsider its scheduling and notified the court that it was unable to reissue the subpoenas to witnesses for May 29, 2003, because the sheriff could not deliver the subpoenas in such a short time. In addition, the state informed the court that there were no prosecutors available on May 29, 2003, to present the case due to other hearings and court obligations. The district court denied the motion to reconsider its order on May 28, 2003, and notified the state it would conduct the trial on May 29. On May 29, after the district court's denial of the original motion to reconsider, the state filed a motion to dismiss the charges without prejudice so the state could drop the charges and recharge the defendant at a later date. The district court denied the motion to dismiss and informed the state it would only dismiss the charges with prejudice. On May 29, 2003, the state refused to proceed at trial due to the premature release of its witnesses. The district court granted the defendant's

dismissal motion with prejudice and the state filed the appeal.

A district court's dismissal with prejudice is reviewed for an abuse of discretion. A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable way. At common law, the general rule was that a prosecuting attorney has full discretion to determine whether to prosecute a criminal case. However, with the introduction of the federal rule and similar state rules, courts have some supervisory power over the prosecution of a case.

Generally, the prosecutor is considered to be in the best position to evaluate the charges and the evidence to determine if prosecution should continue. Prosecutors are presumed to be acting in good faith when requesting a dismissal. A prosecutor's decision to move forward with charges is not absolute but is subject to review by the district court. Although the district court has some supervisory control over dismissals, the district court should not dismiss the case with prejudice unless the court has had an opportunity to determine the issues of bad faith, harassment, or misconduct.

A finding of harassment would justify dismissal with prejudice but the finding must be clearly supported with clear and convincing evidence. No finding of harassment, abuse, or prosecutorial misconduct was made by the district court at any time prior to its dismissal of the charges with prejudice. Dismissal with prejudice is a remedy that should only be used in extreme circumstances. The dismissal of the case was an abuse of discretion because the court did not make the required finding of bad faith or harassment on the part of the prosecution by clear and convincing evidence.

JURY VERDICT - INCONSISTENCY

In *State v. McClary*, 2004 ND 98, 679 N.W.2d 455, the court affirmed the defendant's conviction of abuse or neglect of child.

The defendant had been originally charged with felony murder. However, he was found not guilty of that offense by the jury but guilty of the

underlying felony, abuse or neglect of a child. On appeal, the defendant claimed the verdict was legally inconsistent because the jury reached conflicting findings on a necessary element of each count when making its verdict. In reviewing several federal and state court decisions, the court noted an inconsistent acquittal and guilty verdict

against a single defendant in the same prosecution does not entitle the defendant to relief. An attempt at an individualized assessment of the reasons for the inconsistency would be based either on pure speculation or would require inquiry into the jury's deliberation, an inquiry the courts generally will not undertake. An inconsistent verdict is a situation where the jury has not followed the court's instructions and the verdict cannot be rationally reconciled. In this case, the court concluded the jury's acquittal of the defendant of murder and conviction of abuse and neglect of a child can be rationally reconciled and does not represent inconsistent verdicts. The court instructed the jury it could find the defendant guilty of murder if it found the defendant willfully caused the child's death under circumstances manifesting an extreme indifference to human life "and/or" committed or attempted to commit a felony offense against a child and, in the course of and furtherance of such a crime, caused the child's death. Use of the phrase "and/or" indicates a combination of the conjunctive and the disjunctive and suggests an alternative which should have been avoided. Moreover, the part of the court's instruction about committing or attempting to commit a felony offense against a child did not state the felony offense was abuse or neglect of child, and nothing in the court's instructions informed the jury the felony offense was abuse or neglect of child. The court's murder instruction should have used the disjunctive "or" and should have identified the "felony offense" as abuse or neglect of child.

Under the court's instructions, if the jury found the defendant did not willfully cause the child's death, under circumstances manifesting an extreme indifference to the value of human life, the "and/or" language may have precluded the jury from alternatively considering whether the defendant caused the child's death while committing or attempting to commit a felony offense against a child. Even if a jury had considered that alternative element, the jury was not informed that abuse or neglect of child was the felony offense against the child. Although the parties may have argued the felony offense was abuse or neglect of child, the court instructed the jury that the court's instruction was the law governing the case and it was the jury's duty to accept the law as given in the instructions.

A jury is presumed to follow instructions given by the trial court. The court's murder instruction

benefited the defendant and he cannot complain about instructions that were more favorable to him. There was evidence the defendant admitted shaking the child but there was also evidence that he did not believe the shaking was sufficient to cause the child's death. Under these instructions and the evidence, the jury could have acquitted the defendant of murder and found him guilty of abuse or neglect of child. The jury's verdicts can be rationally reconciled and are not inconsistent.

The court also rejected the defendant's claim the trial court should not have instructed the jury on the charge for abuse or neglect of child, the court should have realized the abuse or neglect of child charge was a necessary included offense in the felony murder charge, and that it could only instruct on it if the jury could reasonably acquit on the greater offense. He argued that the jury could not acquit him of felony murder and at the same time find him guilty of the underlying felony.

The court noted the defendant's argument ignored that he was charged with murder under alternative theories. A neglect or abuse of a child is not a lesser included offense of felony murder. "Included offense" means an offense established by proof of the same or less than all the facts required to establish the commission of the offense charged. A felony murder charge does not require the defendant to have committed the underlying felony, and the underlying felony is not an included offense of felony murder.

The defendant's claim that the trial court committed error in refusing to question the jury about his guilty verdict was also rejected. Nothing in the language of N.D.C.C. § 29-22-26 requires the trial court to ask jurors how they reached their verdict. Rather, the plain language of the statute requires a trial court to determine whether a verdict conforms to the law of the case before accepting the verdict. A trial court satisfies its obligation under that provision by comparing the verdict of the law of the case, and the court is not required to question individual jurors about how the verdict was reached. North Dakota Rule of Evidence 606(b) generally prohibits a juror from testifying about the mental processes inherent in arriving at a verdict and is limited to cases where extraneous prejudicial information was improperly brought to the juror's attention, whether any outside influences were improperly brought to bear upon a juror, and whether the verdict was arrived at by chance.

SEARCH AND SEIZURE - CONSENT SEARCH

In *State v. Guthmiller*, 2004 ND 100, 680 N.W.2d 235, the court affirmed an order denying the defendant's motion to suppress evidence.

The defendant was arrested for minor in consumption after a minor female reported that she had been drinking at the defendant's home and other persons were present. Officers knocked on the front door, identified themselves as police officers, and saw a glass smoking device on a table through a window to the right of the door. The defendant consented to their entry into the house. At the suppression hearing, the defendant denied that he had given consent.

The standard for measuring the scope of a suspect's consent under the fourth amendment is that of objective reasonableness. What would the typical reasonable person have understood by the exchange between the officer and the suspect?

In an appeal from an order issued on a suppression motion, an appellate court will accord great deference to the trial court. The trial court hears the witnesses, sees their demeanor on the stand, and is in a position to determine the credibility of the witnesses. The trial court is in a much better position to ascertain the true facts than an appellate court relying on a cold record. From a review of the record, the court concluded there was sufficient evidence to support the trial court's finding that the defendant consented to the entry of his residence, according the appropriate deference to the trial court in light of its superior opportunity to observe the witnesses and assess their credibility in determining the objective reasonableness of what the defendant and the officers understood from their exchange.

PROBATION REVOCATION - RESTITUTION

In *State v. Nordahl*, 2004 ND 106, 680 N.W.2d 247, the court affirmed the order revoking the defendant's deferred imposition of sentence.

The defendant entered a plea of guilty to theft of property by deception. As a part of a plea agreement, the theft charge was reduced from a Class B felony to a Class A misdemeanor. In addition, the defendant was required to pay restitution in an amount in excess of \$100,000 to 12 victims. Restitution was to be made by March 15, 2003, and the defendant agreed to the conditions in the plea agreement including the amount of the restitution.

To satisfy the restitution by the required date, the defendant began selling assets. These assets included part of his farm, farm equipment, and a school bus. However, these assets were encumbered and either the proceeds were unavailable for application to restitution or assets were lost in foreclosure proceedings.

On August 7, 2003, the court heard arguments on the petition to revoke probation based upon failure to make restitution. The defendant attempted to explain why he was deficient in his payment of the restitution obligation. The court determined that the defendant violated his plea agreement, revoked his probation and imposed a sentence of one year imprisonment in addition to paying restitution.

The defendant argued the district court abused its discretion when it revoked his probation for failure to pay the restitution required on the date specified on the plea agreement.

A reviewing court will review probation revocation proceedings under a two step analysis. First, the court determines whether the district court's factual findings were clearly erroneous. Second, the court determines whether the district court's decision to revoke or modify probation was an abuse of discretion.

As to the first step, the defendant admitted that he did not pay the amount required. He argued, however, that he made a good faith effort to make payment of the restitution obligation but was unable to do so.

When restitution is imposed by the district court as a part of a defendant's sentence, the district court must proceed with a restitution hearing pursuant to statute. If a defendant agrees to restitution as a part of a plea agreement, he is not entitled to a hearing to determine whether he has the ability to pay restitution. The defendant agreed to pay restitution as a part of his plea agreement, which specifically set out the amount to be paid and the time in which to make payment. The district court was not required to make a finding that the

defendant was financially unable to comply with the restitution requirement.

The defendant knew his financial situation before he entered into the plea agreement with the state's attorney. He was in a position to know the nature and extent of his finances and to evaluate his ability to pay the restitution obligation. Prior to entering the plea agreement, the defendant knew of the encumbrances on his farm and other property. The defendant was aware that the outstanding obligations to the bank would go unfulfilled if he paid the restitution obligation in full or, in the alternative, the bank would lose its collateral.

The defendant is presumed to have had knowledge of his assets and obligations at the time he entered into the plea agreement. He entered into a security agreements in order to secure financing. He knew or should have known the encumbrances on his assets could frustrate his ability to liquidate and fulfill his restitution obligation. In this case, the defendant had control over the plea agreement and its contents. The severity of his offense was lessened from a felony to a misdemeanor based on his agreement to quickly repay the victims.

JURY INSTRUCTIONS - PEREMPTORY CHALLENGE

In *State v. Flanagan*, 2004 ND 112, 680 N.W.2d 241, the court affirmed the defendant's conviction of gross sexual imposition.

The defendant was charged with gross sexual imposition for allegedly engaging in sexual contact with a person less than 15 years old. The state presented evidence that the victim was 13 years old on the date of the offense and on that the date defendant inappropriately put his hand under her swimsuit bottoms, on her hips and the strings of her bikini bottom, on her bikini top over her breast, under the top part of her swimsuit, and on her buttocks. Evidence was also presented that the defendant pinched the victim's buttocks. The defendant claimed that any touching of the victim was accidental and not for the purpose of arousing or satisfying his sexual desires. He was found guilty.

Although the defendant did not object to the jury instructions, he claimed on appeal that the trial court committed obvious error by not instructing the jury the sexual contact must have been with a person less than 15 years old, and that the instruction was facially incorrect. Sexual contact with a person less than 15 years old is an essential element of the offense.

Because the defendant did not object to the court's instructions, he failed to adequately preserve the issue for review on appeal and the court's inquiry was limited to whether the court's failure to instruct the jury on the essential element was obvious error affecting the defendant's substantial rights. The court concluded the trial court's failure to instruct the jury in the elements of gross sexual imposition for allegedly engaging in

sexual contact with a person less than 15 years old was obvious error. However, the court also concluded it was not reversible error.

The court reviewed the record and found that the identity of the victim of the inappropriate touching was essentially undisputed at trial and the evidence focused on whether the defendant's touching of the victim was accidental for the purpose of arousing or satisfying his sexual desires. It was also undisputed that the child was less than 15 years of age at the time of the incident. This is not a case about an erroneous jury instruction shifting the state's burden of proof for a defense to the defendant. There was no basis for holding the trial court's erroneous jury instruction seriously affected the fairness, integrity or public reputation of the judicial proceeding. Rather, the reversal of the defendant's conviction would seriously affect the fairness, integrity of public reputation of the judicial proceeding.

The court also rejected the defendant's claim that the state used gender-based peremptory challenges to eliminate prospective male jurors from the jury and to seat 12 female jurors. During jury selection, the state used peremptory challenges to remove five males and one female from the jury, and the defendant used peremptory challenges to remove five males from the jury. As a result, a jury of 12 females was chosen to decide the case. In response to a question from the trial court, the defendant indicated he had no objection or problem with the jury selection process and he raised this issue for the first time on appeal. On the record, the court concluded the claim of the defendant did not rise to the level of obvious error justifying reversal.

SPECIAL VERDICTS

In *City of Mandan v. Sperle*, 2004 ND 114, 680 N.W.2d 275, the court affirmed the defendant's conviction of disorderly conducting in violation of a city ordinance.

The defendant claimed her due process rights were violated because the verdict form submitted by the court included several alternative acts supporting a violation of the ordinance. The defendant argued the verdict form should have required the jury to unanimously find one specific act constituting disorderly conduct in violation of the ordinance rather than allowing the possibility that individual jurors could find the defendant committed different acts constituting disorderly conduct.

The defendant did not raise this issue before the trial court and did not object to the jury instructions or the jury verdict form. The conviction may not be reversed unless the defendant shows that the error is plain and affects substantial rights to be reviewed as obvious error.

Special verdicts or interrogatories in criminal cases are disfavored because they may coerce a jury into rendering a guilty verdict or destroy the ability of the jury to deliberate upon the issue of guilt or innocence free of extraneous influences.

North Dakota Rules of Criminal Procedure 31(e) authorizes a special verdict form in very limited circumstances in criminal trials relating only to certain defenses raised by the defendant and to overt acts of treason.

The city ordinance involved alternate behaviors that included fighting, threatening behavior, and abusive or offensive language that results in harassing, annoying, or alarming another person. Although the defendant did not object to the jury instructions or verdict form, she claimed the court should have submitted a form requiring the jury to specifically indicate the particular conduct that violated the ordinance. The ordinance in this case permitted the jury to find the defendant guilty of disorderly conduct through a number of alternative behaviors, any one of which is deemed disorderly conduct and none of which is exclusive. The evidence in the case would support a rational fact-finder's conclusion that the defendant had committed all of these behaviors, any one of which is sufficient to constitute prohibited conduct in a violation of the ordinance. The defendant failed to show the alleged error of the court in submitting a general verdict form constituted an exceptional case involving obvious serious injustice.

AMENDMENT OF COMPLAINT

In *State v. Higgins*, 2004 ND 115, ____ N.W.2d ____, the court reversed the trial court's order denying a motion to amend a criminal complaint and granting the defendant's motion to dismiss.

The defendant received a citation alleging that he committed the offense of operating a motor boat while under the influence in violation of N.D.C.C. § 20.1-13-07 and the Governor's boating proclamation. The defendant filed a motion to dismiss or suppress evidence, asserting that he could not be convicted of operating a motor boat under the influence of alcoholic beverages since the term "alcoholic beverages" was not found in the statute and there was no reasonable and articulable suspicion for the officers to stop the defendant's pontoon. The state moved to amend the complaint and the motion was denied by the trial court when it concluded there was insufficient evidence to believe the statute had been violated because the statute made no reference to

alcoholic beverages as being an element of an alleged crime.

The defendant had been cited by use of a uniform complaint. Uniform complaints, like the one issued in this case, were recognized by the court as generally not drawn by attorneys and are often hastily drawn. A complaint may be amended within the trial court's discretion. The court could discern no possibility of prejudice to the defendant from amending the complaint and the trial court abused its discretion denying the state's motion to amend the complaint.

The court also rejected the defendant's claim there was not a reasonable and articulable suspicion to stop his boat. The North Dakota Administrative Code requires all motor boats under 26 feet exhibit a combination red and green bow light, visible for one mile, between sunset and sunrise. The North Dakota boat and water safety guide issued by the North Dakota Game and Fish

Department restates the requirement of the use of a red and green bow light between sunset and sunrise. The defendant's boat was stopped because the red and green navigational lights were not visible for the required one mile. The boat was being operated with docking lights that blocked the red and green navigation lights.

At the time of the observation of the defendant's boat, the officer was approximately one-half mile away. This observation provided the officer with reasonable and articulable suspicion that the defendant was in violation of a regulation requiring that, between sunrise and sunset, his boat exhibit a red and green bow light visible for one mile.

N.D.C.C. § 20.1-13-07(2) prohibits a person from operating a motor boat or vessel while intoxicated or under the influence of any narcotic drug, barbiturate, or marijuana. It makes no reference to alcoholic beverages.

In construing statutes, the court's primary objective is to ascertain the legislative intent by looking at the language of the statute itself. If the meaning of a penal statute is obscure, the court will consider legislative intent in determining its

meaning. While an ambiguous statute should be construed in favor of the defendant, the court will not adopt a construction that would produce an absurd result. The court presumes the legislature acts with a purpose and does not perform useless acts.

The court noted that other statutory provisions provided for implied consent to chemical testing of boat operators. Construing N.D.C.C. § 20.1-13-07(2) in light of the plain, ordinary, and commonly understood meaning of "intoxicated," and in light of N.D.C.C. ch. 20.1-13.1 (Boating Implied Consent Law) on the same subject, together with the legislative history, the evident purpose is revealed to create an implied consent to chemical testing to facilitate prosecutions for boating while intoxicated in violation of N.D.C.C. § 20.1-13-07(2). The court concluded that operating a motor boat or vessel while intoxicated through the consumption of alcoholic beverages violates that statutory provision, and the trial court committed error in dismissing the complaint on the ground the statute did not specifically refer to alcoholic beverages.

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